No. 92-519

Supreme
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court U.S.
FILED
JUL 2 1993
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BOLLEY JOHNSON, *et al.*,
Appellants,

v.

MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

REPLY BRIEF OF APPELLANTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Neither the De Grandy Appellees nor the United States dispute that Senate Joint Resolution 2-G ("the State Plan") will afford Hispanics, who constitute 45% of the voting age population of the 20-District Dade County area, an opportunity to elect their preferred candidates in at least 9 of the 20 districts (or 45%). The United States does not dispute that the maximization theory of Section 2 liability—on which the district court's judgment was clearly based—is wrong as a matter of law. The United States also concedes that proportional results in the Dade County area would negate liability if the allegations of vote dilution were confined to that area.[1] Thus, notwithstanding the De Grandy Appellees' continuing plea for maximization, there is virtually no doubt that the district court's finding of vote dilution in the Dade County area must be reversed as a matter of law.

For that reason, the United States devotes most of its brief to arguing that appellees proved Hispanic vote dilution throughout the State of Florida, not merely in Dade

[1] *See* **Brief of the United States (U.S. Br.) at 19.**

County. Appellees, however, cannot prevail on this alternative ground because their statewide theory of liability is wrong as a matter of law: it demands "local" maximization of minority districts based on geographically remote and dispersed minority residents whose electoral opportunities are wholly unaffected by the way districts are drawn in the local area. The statewide theory is also insupportable on the facts, both because appellees never attempted to prove dilution outside Dade County and because the State Plan affords Hispanic *citizens* statewide proportionality.[2]

I. THE DISTRICT COURT'S JUDGMENT CANNOT BE AFFIRMED ON THE GROUNDS SET FORTH IN ITS OPINION.

Despite the United States' concessions, the De Grandy Appellees argue that Section 2 requires States to maximize the number of districts in which a minority class can elect its preferred representatives even if, as here, the class would exceed proportional representation under that standard. *See* De Grandy Br. at 22-24. This argument—although having the virtue of fidelity to the case appellees sought to prove at trial and the rationale of the district court's decision[3]—cannot be reconciled with the statu-

[2] This Court need not reach the remedial issues because the district court's liability determination should be reversed. In any event, the United States agrees that the district court's remedial order must be vacated. And while the De Grandy Appellees have not acquiesced in a remand, they offer no substantial argument in defense of the remedial order. Thus, the remedial issues will not be addressed further in this reply.

[3] The district court found the State Plan in violation of Section 2 "in that the plaintiffs have shown that more than nine Hispanic districts may be drawn." VIII Tr. 82. That result was based entirely on a comparison of the State Plan with an alternative plan expressly designed "to create the maximum number of Hispanic districts in Dade County." II Tr. 184 (testimony of Daryl Reaves); *see also* Affidavit of Dario Moreno, U.S. Exh. 45, at ¶ 51 (State plan "fail[s] to create the maximum number of majority minority districts"); *id* at ¶ 59 ("the De Grandy plan . . . maximizes the number of minority majority seats in South Florida").

tory language of Section 2 or with this Court's precedents. Nor can appellees' unyielding mandate for maximization be disguised by their general reference to the "totality of the circumstances" that supposedly exist in Dade County. The simple fact is that those circumstances *resulted* in Dade County's Hispanic voters having the same opportunity as everyone else to elect representatives of their choice. That is all Section 2 requires.

Appellees acknowledge that *Gingles* did not establish a maximization standard for vote dilution cases involving single-member districts, but argue that "[w]hat might have been controversial in *Gingles* is now settled law," as a result of *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993). *See* De Grandy Br. at 24. *Voinovich*, however, held only that proof of the *Gingles* preconditions is *necessary* in cases challenging single-member districts. Because the plaintiffs in *Voinovich* failed the "necessary" test, the case plainly does not establish that proof of the *Gingles* preconditions is *sufficient* to establish vote dilution in a challenge to single-member districts.[4]

As appellants demonstrated, proof of the *Gingles* preconditions simply does not make out a *prima facie* case of vote dilution in the single-member context. The *Gingles* preconditions are plainly relevant in the single-member context because they establish causation, *see Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993), but they cannot play the same role they do in multimember district cases.

[4] The Court's recent summary affirmance in *African American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 113 S. Ct. 1809 (1993), also contradicts appellees' claim that the maximization standard is "settled law." According to the United States, the summary affirmance did not necessarily decide any issues on the merits because the appellees raised several technical and procedural challenges to the jurisdictional statement. *See* U.S. Br. at 23 n.5. But the appellees did not move to "dismiss or affirm" the district court's judgment: they moved solely to *dismiss* and raised *only* objections to the form of the jurisdictional statement. The Court did not dismiss the appeal; it affirmed on the merits notwithstanding the alleged technical deficiencies of the jurisdictional statement.

See Voinovich, 113 S. Ct. at 1157 ("the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim"). Under *Gingles*, a plaintiff class might well be able to demonstrate that additional single-member districts could be created, even though the challenged districts already afford proportional representation. *See* Brief of Appellants at 24-26.

In order to make out a *prima facie* case, plaintiffs must also prove that they are not on equal footing with the rest of the electorate. If there is "parity between votes and representation," then, by definition, the group has an equal electoral opportunity. *See Davis v. Bandemer*, 478 U.S. 109, 125 n.9 (1986). Thus, to allege a violation of Section 2, plaintiffs must show a substantial disparity between the minority class's percentage of the voting population and their level of electoral success, as well as the existence of the *Gingles* preconditions, which establish that the State's plan is to blame. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 99-100 (1986) (O'Connor, J., concurring) ("[t]he court must find that even substantial minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates to cancel out or minimize the voting strength of the racial group" (quotation omitted)).

In this case, appellees have conceded they cannot prove such a disparity within the 20-district Dade County area in which they alleged, and sought to prove, Hispanic vote dilution.[5] Because they cannot make that showing, "Section 2 simply does not speak to the matter." *Voinovich*, 113 S. Ct. at 1149.

[5] The United States concedes that an assessment of the plan can "be based on the likely effects of a plan that has not yet been put into effect, just as it can be based on the actual results of past elections." U.S. Br. at 19. As this concession indicates, there is no merit to the argument of the De Grandy Appellees and *amicus* the Lawyers Committee for Civil Rights, that proportionality cannot be assumed given alleged past underrepresentation of Hispanics. *But see* note 7 *infra*. Here, there is no dispute—and the district court found—that the State Plan will permit the election of at least 9 Hispanic-preferred candidates in Dade County during the life of the plan, and 9 Hispanic-preferred candidates were elected in 1992. *See* Brief of Appellants at 3.

Ignoring the compelling numerical *results* under the State Plan, appellees counter that the "totality of the circumstances" somehow justified the district court's conclusion. *See* De Grandy Br. at 22; U.S. Br. at 16-18. That argument misconceives the "totality of the circumstances" language in Section 2. The "totality of the circumstances" is not a *standard* for measuring vote dilution. Rather, it is a statutory directive concerning what evidence should be considered in determining whether vote dilution has occurred. It thus adds nothing to appellees' argument because it cannot independently justify a maximization requirement. Absent substantially unequal results, no basis exists for a finding of dilution under *any* circumstances.

Indeed, the centerpiece of appellees' "totality" argument—alleged "fragmentation" and "packing" of Hispanic voters in Dade County—is nothing more than a reformulation of appellees' maximization standard. As used by appellees, "fragmentation" and "packing" are simply pejorative labels for a legislature's decision not to create a minority district that could have been created. Every redistricting choice, of course, "fragments" some populations and "packs" others. That is why the ultimate question in a vote dilution case is not whether fragmentation or packing can be said to have occurred in some abstract sense, but whether minority and majority voters in the same geographic area have been, relatively speaking, "fragmented" or "packed" in like measure.[6]

Nor can the "circumstances" of relative socio-economic disadvantage and the "fear of language-based discrimination" establish a Section 2 violation absent a showing that the challenged districts produce unequal results. If,

[6] Appellees did not allege, and the district court did not find, that this alleged "fragmentation" and "packing" was intentional invidious discrimination.

irrespective of alleged disadvantage and discrimination, Hispanic voters in Dade County can elect preferred candidates at levels proportionate to the level of the Hispanic voting population, then no vote dilution has occurred. Indeed, that is precisely what the Court held with respect to District 23 in *Gingles*. 478 U.S. at 77 (plurality opinion); *id.* at 102 (O'Connor, J., concurring).[7]

Congress's command to consider "the totality of the circumstances" does not invest a district court with wide discretion to improve levels of minority electoral success whenever such improvement is possible. Yet that is what the district court did here. *Gingles* itself makes clear that vote dilution is shown only if "under the totality of the circumstances" the challenged electoral mechanisms "result in *unequal* access to the electoral process." 478 U.S. at 46 (emphasis added). The "totality of the circumstances" prove vote dilution only when they show " 'strong indicia of lack of political power and the denial of fair representation.' " *See Gingles*, 478 U.S. at 98 (O'Connor, J., concurring) (quoting *White v. Regester*, 412 U.S. at 766). That showing was not made here.

II. THE DISTRICT COURT'S JUDGMENT CANNOT BE AFFIRMED ON THE ALTERNATIVE STATEWIDE THEORY APPELLEES NOW ADVANCE.

The United States recognizes that the district court cannot be affirmed on the basis of its finding of vote dilution within the 20-district Dade County area. For that reason,

[7] Appellees' proof on these issues was doubtful in any event. Although appellees and their amici make much of the fact that no Hispanic was elected to the legislature from South Florida between 1882 and 1982, *see* Brief Amicus Curiae of the Lawyers Committee for Civil Rights at 9, that proves nothing about alleged exclusion of Hispanics from the political process. As of 1960, the Hispanic population of Dade County was minuscule. *See* Brief of Appellants at 8 n.16. That population has grown enormously in the past thirty years as a result of massive migration from Cuba and other Latin American nations. As these immigrants became citizens—a process that takes many years, as the United States notes, *see* U.S. Br. at 31 n.11—and were thus eligible to vote, they assimilated into public life. *See* Brief of Appellants at 31.

the United States now argues that appellees proved "Hispanic vote dilution throughout the State," which could be remedied only by creating two additional Hispanic districts in Dade County. This argument is wrong on the facts and as a matter of law.

A. The Record Will Not Support A Finding of Statewide Vote Dilution.

Even if appellees' statewide theory of liability were plausible as a matter of law—and it is not, *see* Point II.B. *infra*—statewide liability cannot be made out on the facts of this case.

As this Court recently explained:

> racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of Section 2.

Shaw v. Reno, 1993 WL 224459 at *13 (U.S.N.C. June 28, 1993); *see also Growe*, 113 S. Ct. at 1085. This unyielding requirement furthers two critically important values of constitutional stature. First, it prevents unwarranted federal court intrusion into the core state function of reapportionment. Second, it assures that Section 2 liability will not be based on "impermissible racial stereotypes" that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 1993 WL 224459, at *10. For these reasons, plaintiffs must prove the *Gingles* preconditions for the *entire area* in which they allege vote dilution. An allegation of statewide vote dilution must be supported by a showing of the *Gingles* preconditions on a *statewide* basis. Indeed, when plaintiffs pursue a statewide case, statewide proof of the *Gingles* preconditions is "all the more essential" because such a theory would appear to rest on precisely the untenable stereotypes criticized in *Shaw*. *See Growe*, 113 S. Ct. at 1085.

Appellees have not even remotely made the requisite showing here.

Far from proving a claim of statewide vote dilution, appellees expressly *abandoned* it, and limited their proof to the Dade County area. The De Grandy Appellees candidly acknowledge this fact in their brief: "counsel stated on the record that the evidence of vote dilution would be presented only with regard to Dade County," and the proof was "limited to the South Florida area." De Grandy Br. at 27. The United States said the same thing at trial, resisting a directed verdict on the ground that the evidence "establish[es] a prima facie case of vote dilution *against Hispanic voters in the Dade County area*." III Tr. 193; J.A. 280 (emphasis added); *see* III Tr. 194-95 (United States has "demonstrated . . . political cohesion . . . *in Dade County*," and that "there is a white bloc vote *in Dade County*" (emphasis added)). Indeed, Appellees themselves voluntarily sought dismissal of any vote dilution claim involving Hispanics outside Dade County. III Tr. 215. In granting the motion, the district court made plain that it was "conforming the pleadings to the evidence." III Tr. 214.[8] Having chosen Dade County as their frame of reference, appellees are not free to change it in this Court. *Brown v. Thomson*, 462 U.S. 835, 846 (1983).

[8] The only indication in the record that appellees pursued a statewide case at trial are isolated remarks by counsel for the United States at closing argument—to the effect that "this case is not about Dade County." Those remarks cannot help appellees. Statements of counsel are no substitute for proof of the *Gingles* preconditions, and counsel had no power to revive claims previously abandoned.

In any event, counsel's statements have nothing to do with whether vote dilution had been proven on a statewide basis. Counsel's argument was made during closing arguments on the Senate portion of the trial. The Senate had claimed that additional Hispanic Senate districts would lessen opportunities for African-Americans and would require unnaturally elongated districts stretching far to the north and west of Dade County, and that Section 2 does not require the creation of such districts. The statements of counsel now quoted by the United States were plainly intended to rebut the particular, narrow compactness defense raised by the Senate.

In accordance with these rulings and representations, the record is barren of evidence to support a finding of statewide vote dilution. Most significantly, the district court's lengthy opinion contains *no* findings respecting Hispanic political cohesion or bloc voting in areas of Florida other than Dade County. To the contrary, the district court's findings were limited to Dade County. *See* 92-519 J.S. App. 44a-53a.[9]

To the extent appellees' experts addressed the issue of statewide cohesion, in fact, they gave testimony devastating to the case the United States now seeks to make. Dr. Moreno, for example, went to great lengths to demonstrate that Dade County's Hispanic population was politically *distinct* from other Hispanic communities. He explained that the Dade County "Cuban vote stands in stark contrast to that of other Latinos across the U.S." because Dade County Hispanic voters are extremely conservative and display an overwhelming and extremely strong allegiance to the Republican party. Moreno Aff. ¶ 26; J.A. 182.[10]

Dr. Thomas Hofeller gave affidavit testimony that the Hispanic population of Tampa—the largest Hispanic population center outside Dade County—"is predominantly Democrat and, as noted by the Department of Justice, is

[9] That is doubtless because appellees' experts limited their testimony on political cohesion and bloc voting to Dade County. Dr. Moreno testified that he had "not looked at any data outside Dade County," IV Cong. Tr. 317, and, specifically, that he had not "looked into" whether "Hispanics outside of Dade County are politically cohesive with the Hispanics inside Dade County." III Tr. 292. Dr. Lichtman likewise limited his testimony to issues of cohesion and bloc voting "for Dade County." Affidavit of Allan Lichtman, Exh. 46, III Tr. 106; J.A. 201-02.

[10] *See also* II Tr. 16 (Dario Moreno) ("The Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more republican than other Hispanic groups").

cohesive with black voters." [11] He also testified that the substantial Hispanic population in Palm Beach County consisted of "primarily farm workers who traditionally vote Democratic, . . . are not of Cuban heritage and vote in a cohesive pattern with the black community with whom they share similar economic interests." [12] The same Dr. Hofeller then noted the "serious degree of polarization between black and hispanic voters in Dade County," and urged that every effort be made *not* to join those two populations in the same districts.[13] This evidence alone precludes any inference of statewide Hispanic political cohesiveness.

The only "evidence" of statewide Hispanic cohesiveness the United States can muster from the voluminous record is a single sentence in the district court's opinion respecting congressional redistricting, in which appellants allegedly concede that "Hispanics were generally cohesive throughout the State." U.S. Br. at 33. The United States does not quote the language memorializing this purported concession, but merely cites to "92-519 J.S. App. 79a." [14] The only remotely relevant language on that page is the sentence "[t]he parties agree that racially polarized voting exists throughout Florida to varying degrees."

On its face, the sentence reflects agreement that racially polarized voting in Florida *varies* from region to region across the State—not that Hispanics are cohesive throughout the State. But even if voting were racially polarized across Florida to a significant degree,[15] that fact would

[11] Affidavit of Thomas B. Hofeller at 7; J.A. 164.

[12] Hofeller Aff. at 10-11; J.A. 167.

[13] *Id.* at 9; J.A. 166. *Se also* III Tr. 35-36 (Testimony of Allan Lichtman) ("black and Hispanics in Dade County are not jointly cohesive"); J.A. 369.

[14] U.S. Br. at 33.

[15] Findings in the congressional portion of the case do not establish the requisites of a Section 2 violation. As the court explained, "[t]he congressional inquiry was different from the inquiry in this Section 2 case because in the former, we were merely 'considering' Section 2 when formulating districts, while here we are presented with a specific challenge to the Florida plan." 92-519 J.S. App. 39a n.27. Nor does any evidence submitted during the congressional proceedings establish statewide Hispanic political cohesion. The statement by appellants' expert, Dr. Lisa Handley, that "the majority of Hispanics tend to vote for Hispanics"—to which the United States points as additional evidence for its statewide case—was made in reference to a single Congressional district.

not establish cohesion between Hispanics in North Florida and Hispanics in Dade County. For example, if the majority white population in North Florida were conservative and the Hispanic population liberal, voting might be racially polarized, but the liberal Hispanic voters in the northern part of the State would have little in common with the distinctively conservative Dade County Hispanic population.[16]

Appellees have also failed to demonstrate that bloc voting usually defeats Hispanic-preferred candidates on a statewide basis. The record contains *no* evidence indicating that Hispanic-preferred candidates outside of Dade County are usually defeated by the votes of a unified majority. To the contrary, the record confirms that Hispanic voters in Tampa have not suffered vote dilution because those voters have repeatedly elected a Hispanic to the House. IV Tr. 43. Proof of bloc voting in Dade County does not suffice because the "inquiry into the existence of vote dilution . . . is district specific." *Gingles*, 478 U.S. at 59 n.28. Indeed, "racial voting statistics from one district are ordinarily irrelevant in assessing the

[16] The United States claims that its virtual representation theory relies on the idea that Hispanics will "tend" to agree with other Hispanics "on those issues of special concern to Hispanics." U.S. Br. at 24. This statement starkly demonstrates the stereotype which underpins the statewide virtual representation theory. *See Shaw v. Reno*, 1993 WL 224459, at *10. This assumption also undermines the political cohesion requirement in *Gingles*, by attempting to limit it to issues on which minority group members will ostensibly agree. As this Court has made clear, political cohesion cannot be assumed, *see Growe*, 113 S. Ct. at 1085, nor should it be circumvented by circular reasoning.

totality of the circumstances in another district." *See Gingles*, 478 U.S. at 101 (O'Connor, J., concurring).

In *Growe v. Emison*, this Court made clear that "a court may not presume bloc voting within even a single minority group," 113 S. Ct. at 1085, and reversed the district court on the ground that "the *Gingles* preconditions were not only ignored but were unattainable." *Id.* Because nothing in the record in this case demonstrates that the State Plan "thwarts a distinctive minority vote" on a statewide basis, *see id.* at 1084, the district court must be reversed for reasons identical to those set forth in *Growe*.

B. Appellees' Theory of Statewide Vote Dilution Is Wrong As A Matter of Law.

Quite apart from its many factual deficiencies, appellees' statewide liability theory fails as a matter of law. Their theory requires local maximization of Hispanic districts in Dade County in order to ensure that Hispanics in *other* parts of the State are adequately "represented." The theory thus confuses equal electoral opportunity, which Section 2 protects, with an entitlement to predetermined levels of legislative representation, which Section 2 disclaims.

By expanding the frame of reference to comprise the entire State, the United States plainly does not seek to protect the *right to vote* of the additional Hispanic voters who live outside the 20-district Dade County area. Neither the alleged deficiencies of the State Plan in Dade County nor appellees' proposed remedy will have any bearing on the effectiveness of their votes. Geographic dispersion is the sole "cause" of any hypothetical vote dilution they may experience. As *Gingles* makes clear, if "the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, *these minority voters* cannot maintain that they would have been able to elect representatives of their choice in the absence of the . . . electoral

structure." *Gingles*, 478 U.S. at 50 n.17 (emphasis added).

Indeed, the United States makes clear that the statewide theory does not protect the right to vote of Hispanics living outside Dade County; it ensures "virtual representation." *See* U.S. Br. at 24 ("The theory is . . . that House members elected by Hispanic majorities will represent the interests of Hispanics outside their districts . . . on those issues that are of special concern to Hipanics"). That theory is, however, at war with the express language of Section 2 that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). The disclaimer is crucial to effectuating "the balance struck by Congress in amending § 2." *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring). Assuming *arguendo* that majority bloc voting results in the consistent defeat of Hispanic-preferred candidates outside Dade County, the "dilution" occurs entirely as a result of residential patterns. Thus, Section 2 can remedy this dilution only if the statute guarantees representation, rather than protection against state action that abridges the right to compete on an equal footing in the electoral process. That, however, is precisely what the disclaimer precludes.

Appellees' statewide theory also rests on the deeply troubling—and arguably unconstitutional—premise that "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin" will "think alike, share the same political interests, and will prefer the same candidates at the polls," irrespective of the many differences in age, occupation, education, economic status, and distinct local interests. *Shaw v. Reno*, 1993 WL 224459, at *10. Appellees' theory also encourages "elected officials . . . to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether

antithetical to our system of representative democracy." *Id.* at 11.

Despite appellees' claims to the contrary, the *Gingles* compactness requirement must define the relevant population whose votes are arguably diluted. The compactness requirement is more than merely an inquiry into whether an additional minority district could hypothetically be created irrespective of all other concerns. Properly understood, compactness tethers the Section 2 analysis to a principle of equal electoral opportunity within the framework of our representative system of government. A plaintiff alleging Section 2 vote dilution must, therefore, identify a reasonably compact geographic area in which the alleged dilution occurs. That showing will serve to ensure both that the Section 2 claim involves *state-caused* dilution of minority voting strength, and that within the challenged area citizens are able "to relate to each other and their representatives and . . . representatives [are able] to relate effectively to their constituency." *Wilson v. Eu*, 1 Cal.4th 707, 719, 823 P.2d 545, 553 (1992) (describing function of compactness inquiry); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 649 (N.D. Ill. 1991).

Appellees seek to paper over the weakness of their statewide theory by equating its premises with those of appellants' so-called "proportionality defense." But appellees are simply wrong to contend that appellants' case "rest[s] on the premise that the interests of Hispanics outside the districts in which Hispanics are in the majority will be 'represented' in some measure by the House members from those districts." U.S. Br. at 24. Proportionality does not defeat a Section 2 claim because it ensures that *all* members of a protected class are adequately represented in the legislature. Proportionality defeats a vote dilution claim because a parity of votes and representation is compelling *evidence* that opportunities for the minority class to participate in the electoral process equal those of other members of the electorate.

Obviously, some Hispanic voters will be disadvantaged even though a districting plan produces proportional results. This occurs because they will not live in districts where they can consistently vote for a winning candidate, just as some number of Anglo and African American voters will likewise be unable to elect their preferred candidates. That is simply a fact of life in a single-member district system. A districting plan cannot be said to afford unequal electoral opportunity to a minority class if that class is advantaged and disadvantaged to the same degree as other members of the electorate. Thus, proportionality defeats a Section 2 claim for reasons having nothing to do with whether minority voters living outside minority-controlled districts are "virtually represented" in some fashion.

Nor is there merit to appellees' claim that anything less than a statewide frame of reference would create insuperable "practical difficulties." *See* U.S. Br. at 24-25. Plaintiffs simply must define, as part of their case-in-chief, the area where minority voters are sufficiently numerous and geographically compact and suffer from vote dilution. It may be that "[p]laintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is," U.S. Br. at 25, but courts should have no difficulty piercing such efforts at manipulation. This is in fact what courts routinely do when faced with Section 2 cases. *E.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) (court rejected plaintiffs' frame of reference as too small); *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992) (court rejected plaintiffs' frame of reference as too large), *aff'd mem.*, 113 S. Ct. 1809 (1993); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (analyzing vote dilution in specific areas of the state where plaintiff alleged a lack of statewide proportionality). The inquiry is not substantially different from the kinds of judgments courts must make respecting the appropriate labor pool in Title VII disparate impact cases or the appropriate geographic market in Sherman Act

monopolization cases. *See e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 311-12 & n.17 (1977). In this case, there were no "practical difficulties." Appellees identified a 20-district Dade County area as the relevant frame of reference and appellants defended the plan within that frame of reference.

C. Appellees Cannot Prevail Even Under A Statewide Theory of Liability Because The State Plan Affords Hispanic Citizens Proportional Representation On A Statewide Basis.

The United States has conceded that "if a plan had been designed to afford Hispanics representation in proportion to their numbers in the *citizen* voting age population, it would apparently have eight or nine Hispanic seats" because Hispanics constitute 7.15% of the citizen voting age population of Florida.[17] This concession should end the case because the State Plan indisputably provides more than proportional representation to the Hispanic *citizen* population of Florida.[18]

No remand is necessary because the proper disposition of this issue is clear. The text of Section 2 expressly protects against "denial or abridgement of the right of any *citizen* of the United States to vote." 42 U.S.C. § 1973 (a) (emphasis added). Under subsection (b), "a violation . . . is established . . . if it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of *a class of*

[17] Motion to Affirm in Part and Vacate in Part in No. 92-519, at 14-15.

[18] The United States argues that the defense of statewide proportional representation based on citizenship was not raised in the district court. U.S. Br. at 26. But the United States never advanced a theory of statewide liability until it reached this Court. Furthermore, the relevant Census Bureau data was transmitted to the Justice Department on June 8, 1992, more than two weeks prior to the date the United States filed its complaint. J.A. 238. Thus, at the time of trial, the citizenship data that would have conclusively proven statewide proportionality was available to the Department of Justice but was unavailable to the State of Florida.

citizens . . . in that its members have less opportunity than *other members of the electorate*." *Id.* § 1973(b) (emphasis added). Section 2 plainly protects the exercise of the franchise. It was enacted "to help effectuate the Fifteenth Amendment's guarantee that no *citizen's* right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude'." *Voinovich*, 113 S. Ct. at 1154-55 (emphasis added); *see also McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) ("those ineligible to vote have not experienced a dilution of their vote."). The statute thus requires that vote dilution be considered on the basis of those whose rights the statute protects—citizens.

Because only citizens are eligible to vote, a showing of statewide proportional results based on citizenship levels is conclusive proof that Hispanic voters enjoy a level of electoral opportunity at least equivalent to that of other members of the electorate. Plainly, Hispanic *voters* in the State of Florida have at least as much opportunity as other *voters* to elect representatives of their choice. A reapportionment plan affording this level of electoral opportunity cannot violate Section 2.

Appellees have advanced contrary policy arguments centered on the fact that Florida reapportions its legislative districts on the basis of total population. The short answer to these arguments is that the statutory language forecloses them. They are meritless in any event.[19]

The argument that use of citizenship to measure electoral opportunity will result in invidious discrimination against Hispanic non-citizens is factually implausible. In

[19] The United States notes, but does not argue, that, as a result of Florida's approach, "Hispanic citizens as a group have *less* representation—since their representatives must represent more *people*—than other citizens in Florida." U.S. Br. at 29 (emphasis in original). This is wrong. Because Florida reapportions on the basis of total population, each representative's district will contain approximately the same number of persons. Thus, every representative will represent the same number of people, and every person will have equal representation.

any event, it is an equal protection challenge to the use of total population for reapportionment in a State containing substantial numbers of non-citizens. Whatever its merits, the De Grandy Appellees chose not to raise it in the district court. It has nothing to do with how the comparative electoral opportunity of those who are eligible to vote should be assessed.

III. THE DISTRICT COURT'S FINDING THAT HISPANICS COULD CONSTITUTE THE MAJORITY OF THE VOTERS IN ELEVEN DADE COUNTY DISTRICTS IS CLEARLY ERRONEOUS.

The district court also must be reversed because it applied "erroneous legal tests . . . to essential findings of fact." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956). Under *Gingles*, plaintiffs must show that a minority class is "sufficiently large and geographically compact to constitute a *majority* in [the proposed] single-member district[s]." *Gingles*, 478 U.S. at 50 (emphasis added). Districts in which minority voters cannot "dictate electoral outcomes independently," but may "elect their candidate of choice" due to "sufficient cross-over from white voters" are influence districts, *not* geographically compact majority-minority districts that satisfy *Gingles*. *See Voinovich*, 113 S. Ct. at 1155.

The district court's finding that Hispanics could form an "effective Hispanic voting majority" in eleven districts was based on the testimony of appellees' expert, Dr. Allan Lichtman. Dr. Lichtman, however, did not testify that Hispanic voting age citizens would constitute a majority in *any* district. He admitted that he had not studied citizenship levels in Dade County.[20] III Tr. 73,

[20] In at least one other case, the Department of Justice, recognizing that citizenship levels are the crucial benchmark, has refused § 5 preclearance to a district where the population was 65% Hispanic, but the citizen voting age percentage fell below 50% Hispanic. *See* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Bob Bass, March 30, 1992 (Castro County, Texas). A copy of this letter has been lodged with the Clerk of this Court.

J.A. 373. Rather, Dr. Lichtman concluded that "the 11 districts within the De Grandy plan . . . provide Hispanics a realistic opportunity to elect candidates of their choice," Lichtman Testimony, III Tr. 218, J.A. 376, in light of the substantial number of Hispanics (both citizen and non-citizen) *and* cross-over voting. Lichtman Decl. (June 30, 1992) at ¶ 2 n.1, J.A. 213 (crossover rate of 28.5%). *See also* Lichtman Testimony, III Tr. 80, J.A. 374. The district court thus found only that plaintiffs' proposed plan created eleven influence districts—not eleven majority Hispanic districts, as required by *Gingles*. Because the court applied an incorrect legal standard, this finding must be reversed as clearly erroneous.

IV. THE CLAIMS OF BOTH THE DE GRANDY APPELLEES AND THE UNITED STATES SHOULD HAVE BEEN BARRED.

Appellees assert that the Florida Supreme Court's reliance on written evidentiary submissions, rather than live witnesses or other evidence, undermines the preclusive effect of that court's judgment. U.S. Br. at 38-39; De Grandy Br. at 43-44. Federal courts, however, are bound to give state judgments the same preclusive effect that the state courts would so long as a party had a "full and fair opportunity" to litigate its claim. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). To constitute a "full and fair opportunity," state proceedings need do no more than satisfy the minimum requirements of the Due Process Clause. *Id.* at 481. Florida courts plainly would grant preclusive effect to the judgment of the Florida Supreme Court despite the lack of a full evidentiary hearing. *See, e.g., Florida Patient's Comp. Fund v. St. Paul Fire and Marine Ins. Co.*, 559 So. 2d 195 (Fla. 1990); *Avant v. Hammond Jones, Inc.*, 79 S. 2d 423, 424 (Fla. 1955). Federal courts routinely give preclusive effect to state court decisions based solely on written evidentiary submissions. *See Kunzelman v. Thompson*, 799 F.2d 1172, 1177 (7th Cir. 1986) ("[a] full evidentiary hearing

is not always necessary to provide due process protection or a fair opportunity to litigate the issue.").

Moreover, in this case, appellees failed to avail themselves of the Florida Supreme Court's explicit offer of an opportunity to present additional evidence. *See* J.S. App. 120a. Thus, under both federal law and Florida state law plaintiffs received a full and fair opportunity to litigate their claims and the district court's refusal to accord the Florida Supreme Court's judgment preclusive effect was error.[21]

CONCLUSION

The district court should be reversed.

Respectfully submitted,

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[21] The United States is also barred by the *Rooker-Feldman* doctrine from bringing an independent Section 2 challenge in any court other than the Florida Supreme Court. *See Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964).